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Nos. 13-354 & 13-356

In The

Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL.,

Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.,

Respondents,

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,

Petitioners,

v.

KATHLEEN SEBELIUS, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Tenth Circuits

BRIEF OF REPRODUCTIVE RESEARCH AUDIT AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY, ET AL. AND CONESTOGA, ET AL.

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CASES

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).....10, 12, 15, 16

Emp. Div. Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).....8, 9, 12, 13

Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999).....10, 13, 17

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Roman Catholic Archdiocese of New York v. Sebelius, No. 12 Civ. 2542(BMC), 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013).....*passim*

Sherbert v. Verner, 374 U.S. 398 (1963).....*passim*

Stormans, Inc. v. Selecky, 844 F.Supp.2d 1172 (W.D. Wash. 2012).....11, 17, 19

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Thomas v. Review Bd. of the Indiana Emp't Sec. Div., 450 U.S. 707 (1981).....6

Wisconsin v. Yoder, 406 U.S. 205 (1972).....6, 7, 10, 13, 20

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RULES

45 C.F.R. § 147.130(a)(1)(iv)(A) 14

78 Fed.Reg. at 39,874 15

OTHER MATERIALS

Association of State and Territorial Health Officials (2012) "Improving Outcomes and Reducing Costs: Oregon's Initiatives to Improve Birth Outcomes" available at http://www.astho.org/Programs/Access/Maternal-and-Child-Health/_Materials/Improving-Outcomes-and-Reducing-Costs – Oregon%E2%80%99s-Innovative-Reproductive-Health-Program/ 36

TABLE OF AUTHORITIES – Continued

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Atkins, D. & Bradford, W. D. (2014) "Changes in State Prescription Coverage Mandates for Insurers: The Effect of Women's Contraceptive Use" available at http://onlinelibrary.wiley.com/doi/10.1363/46e0314/abstract 36

Bureau of Labor Statistics (2013) "Women in the Laborforce: A Datebook" available at http://www.bls.gov/cps/wlf-databook-2012.pdf.....22, 23, 24

Congressional Budget Office (2013) "CBO's May 2013 Estimate of the Effects of the Affordable Care Act on Health Insurance Coverage" available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/44190_EffectsAffordableCareActHealthInsurance Coverage_2.pdf.....34

Daniels, K., Jones, J. & Abma, J. "Use of Emergency Contraception Among Women Aged 15-55: United States, 2006-2010" available at http://www.cdc.gov/nchs/data/databriefs/db112.pdf.....27, 28

DeNavas-Walt, C. Proctor, B. & Smith, J. (2013) "Income, Poverty and Health Insurance Coverage in the United States: 2012" available at http://www.census.gov/prod/2013pubs/p60-245.pdf.....34

Frost, J. (2013) "Contraceptive Needs and Services, 2010" available at http://www.guttmacher.org/pubs/win/contraceptive-needs-2010.pdf.....33

TABLE OF AUTHORITIES – Continued

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Guttmacher Institute (2014) "Medicaid Family Planning Eligibility Expansions" available at http://www.guttmacher.org/statecenter/spibs/spib_SMFPE.pdf 35

Hasstedt, K. (2013) "Title X: An Essential Investment, Now More than Ever" available at http://www.guttmacher.org/pubs/gpr/16/3/gpr160314.html 33

Health Resources & Services Administration (2014) "Title X Family Planning Clinics" available at http://www.hrsa.gov/opa/eligibilityandregistration/specialtyclinics/familyplanning/index.html 34

Henry J. Kaiser Foundation (2013) "Women's Health Insurance Coverage" available at http://kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage-fact-sheet/ 23, 24, 25

Holahan, J., Buettgens, M., Carroll, C. & Dorn, S. (2013) "The Cost and Coverage Implications of the ACA Medicaid Expansion: National and State-by-State Analysis" available at http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8384.pdf 34

Janiki, H. (2013) "Employment Based Health Insurance: 2010" available at http://www.census.gov/prod/2013pubs/p70-134.pdf 23, 24

TABLE OF AUTHORITIES – Continued

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Jones, H., Mosher, W., Daniels, K. (2012) "Current Contraceptive Use in the United States, 2006-2012, and Changes in Patterns of Use Since 1995" available at http://www.cdc.gov/nchs/data/nhsr/nhsr060.pdf 26, 27

Udeh, B. (2009) "The Cost of Unintended Pregnancy in Iowa: A Benefit-Cost Analysis of Public Family Planning Services" available at http://ir.uiowa.edu/cgi/viewcontent.cgi?article=1047&context=ppc_health 36

U.S. Department of Health and Human Services, ASPE Issue Brief (February 2012), "The Cost of Covering Contraceptives Through Health Insurance" available at http://aspe.hhs.gov/health/reports/2012/contraceptives/ib.shtml 37

Washington State Department of Health (2013) "Washington State Family Planning Client Data Sheet 2012" available at http://www.doh.wa.gov/Portals/1/Documents/Pubs/930-119-ClientDataSheet.pdf 37

Wieczner, Jen (2013) "Why your boss is dumping your wife: UPS joins growing list of companies kicking spouses off health insurance" available at http://www.marketwatch.com/story/why-your-boss-is-dumping-your-wife-2013-02-22 24

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus, Reproductive Research Audit ("RRA") educates through peer-review analysis on the methodology of scientific studies, legislative recommendations, and public programs covering reproductive and end-of-life health issues. RRA's principle expertise includes reviewing and analyzing policies and studies relating to contraception, abortion, fetal and prenatal life, fertility, women's healthcare access, public funding, and end-of-life considerations. RRA's scientists are Ph.D.-level experts in social science and other methodologically related fields. Among its alliance of experts, RRA focuses on evidence-based analysis and conclusions in auditing and preparing studies in its mission-field. RRA seeks to create a dialogue of scholars speaking with scholars, in the hopes of elevating public knowledge on these critical scientific issues.[1]

RRA is a project of the Center for Morality in Public Life ("CFMPL") a 501(c)(3) not-for-profit education center, based in the Commonwealth of Virginia. CFMPL provides a global campus of study, discussion and research to preserve and restore a

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *Amicus Curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties have consented to the filing of this brief.

common language on objective truth, moral goodness and lived beauty. All of CFMPL's sponsored projects place prudence at the service of wisdom and seek to apply "best of" practices in advancing the core-competencies of the related fields. CFMPL is non-partisan and does not engage in any issue-advocacy efforts.

RRA's interests here are to determine whether the federal government's claim that the requirement that employers provide no-cost access to contraception, abortion-causing drugs, and sterilization procedures through employer provided health care plans is the least restrictive means available to accomplish the government's stated goals of promoting public health and general equality. In keeping with its mission, RRA tests the accuracy of such public policy positions in light of available evidence to ensure that basic fundamental liberties are not infringed as a result of the means government chooses to pursue its stated goals.

SUMMARY OF ARGUMENT

When a law or regulation infringes on the free exercise of religion, the government must show that the law or regulation serves a compelling government interest and is narrowly tailored to meet that interest. Religious freedom is at the cornerstone of individual liberty and beyond the control of government except in the most limited of circumstances.

Accordingly, the compelling government interest standard should apply to the government's Mandate that all covered employers provide at no cost to their employees contraception, abortion-causing drugs, and sterilization procedures and related counseling because of its burden on employer's free exercise rights.

Here, RRA focuses on whether the government's Mandate is the least restrictive means available to serve its stated interests of public health and gender equality. This standard is required by the Religious Freedom Restoration Act and this Court's Free Exercise jurisprudence.

The substantial burden on religious objectors' free exercise rights is presumed based on the substantial and crippling fines such businesses and individuals face should they not violate their religious principles and provide the required coverage. RRA leaves to the parties and others to address more fully whether the government's expressed interests satisfy the compelling government interest standard and whether the Mandate actually serves its expressed, albeit generalized interests. Rather, the focus here is on several alternative, less restrictive means that would satisfy the government's stated interests while not violating the religious conscience rights of employers who object to providing the mandated coverage on religious grounds, such as the non-governmental parties in these consolidated cases.

The government has several alternatives to providing women with no cost access to the mandated services. Courts have recognized that the government could have made the mandated coverage available to individuals who work for religious objectors either directly or through the government exchanges by either providing tax breaks to those who sign up for the limited services policy or by paying for the coverage itself. The government could also provide incentives to insurance carriers and manufacturers of contraception to provide the coverage or the medications for no charge.

In addition to the court identified alternatives, the government fails to show that providing an exemption to religious objectors would make the purpose of the Mandate unworkable. First, the government does nothing to cover the millions of women who work for employers already exempted from the Mandate. Second, there is no evidence that the number of businesses that will seek an exemption on religious grounds will create a large number of individuals without contraceptive coverage. Finally, the government already has in place programs such as Title X and Medicaid through which the mandated contraception and sterilization services could be provided at minimal cost to the government.

There is simply no rational basis, let alone a compelling government interest, to require religious objectors to provide the mandated services in violation of their religious beliefs or face substantial fines and penalties. Because other less restrictive means

are available, the government cannot establish a constitutional basis for denying a religious exemption to the Mandate to any religious objector.

ARGUMENT

"The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such. Government may neither compel affirmation of a repugnant belief nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views." *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (internal citations omitted). Here, the government subjects individuals and businesses to substantial fines and penalties should they fail to comply with the government's mandate enacted as part of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148 (2010), to provide at no cost to its employees "'[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed by a provider." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1123 (10th Cir. 2013) (quoting 77 Fed.Reg. 8,725, 8,725 (Feb. 15, 2012)) (hereinafter "the Mandate"). The Court should invalidate the Mandate because it is not the least restrictive means available to satisfy a compelling government interest so that it justifies the

substantial burden placed on religious objectors' free exercise rights.

I. THE GOVERNMENT MUST ESTABLISH THAT THE MANDATE IS NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENT INTEREST.

The claims before the Court are based on both the Free Exercise Clause of the First Amendment to the United States Constitution and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, et seq. ("RFRA"). Both RFRA and the Free Exercise Clause require that to defend the Mandate's admitted substantial burden on religious objectors' free exercise of religion, the government must establish that the Mandate "is the least restrictive means of achieving some compelling state interest," recognizing "that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Thomas v. Review Bd. of the Indiana Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

A. The Religious Freedom Restoration Act Requires the Government to Use the Least Restrictive Means Possible.

When enacting RFRA, Congress expressly stated its intent to protect the "free exercise of religion" for all persons from being burdened by the government, even when involving a "law 'neutral' toward religion."

42 U.S.C. § 2000bb(a)(1) & (2). RFRA requires that laws and regulations having a substantial burden on an individual's or entity's "free exercise of religion" be reviewed under "the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). RFRA specifically provides that a substantial burden on the free exercise of religion may only be upheld if the burden "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). As analyzed below, the Mandate is not the least restrictive means available to justify the substantial burden on religious objectors that would result from compliance with the Mandate.[2]

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[2] Although beyond the scope of this Brief, the requirement that religious objectors must either comply with the Mandate or face penalties and fines of $100 per day for each "individual to whom such failure relates," 26 U.S.C. § 4980D(b)(1), or, if they were to cancel their insurance plan altogether, fines of $2000 per employee per year, 26 U.S.C. § 4980H, is more than sufficient to establish a substantial burden on the free exercise of religion. *See Sherbert*, 374 U.S. at 404 (holding that forcing petitioner "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand" was a substantial burden on the free exercise of religion); *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (holding that after being tried, convicted and fined $5, "the impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to

(Continued on following page)

B. The Free Exercise Clause of the First Amendment Requires the Government Use the Least Restrictive Means Available Before Substantially Burdening the Free Exercise of Religion.

When it comes to the free exercise of religion, "no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment and imbedded in the Fourteenth." *Sherbert*, 374 U.S. at 413 (Stewart, J., concurring). "Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause." *Emp. Div. Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 893 (1990) (O'Connor, J., concurring in result). Accordingly, "the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief. In short, [the] Constitution commands the positive protection of government of religious freedom – not only for a minority, however

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perform acts undeniably at odds with fundamental tenets of their religious beliefs"); *Korte v. Sebelius*, 735 F.3d 654, 683-84 (7th Cir. 2013) (holding that "the federal government has placed enormous pressure on the plaintiffs to violate their religious beliefs and conform to its regulatory mandate" under the Mandate at issue here).

small – not only for the majority, however large – but for each of us." *Sherbert*, 374 U.S. at 415-16 (Stewart, J., concurring).

The compelling interest test which subjects the government's substantial burden on the free exercise of religion to strict scrutiny is at the heart of ordered liberty. "[T]he Founders [did not think] their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty – and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance." *Smith*, 494 U.S. at 909 (Blackmun, J., dissenting). "The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the court to deem this command a 'luxury,' *ante,* at 1605, is to denigrate '[t]he very purpose of a Bill of Rights.'" *Id.* at 903 (O'Connor, J., concurring in judgment).

Here, Hobby Lobby, Mardel, and Conestoga (collectively "Plaintiffs") seek to operate in accordance with their religious principles. In response, the government tells them they must act contrary to their religious convictions or face enormous fines. The government's stated reasons for this substantial burden on an employer's religious freedom should be subject to the strict scrutiny that the compelling interest test demands.

1. Under the compelling interest test, the government must establish the Mandate is the least restrictive means available.

Not only must the Mandate actually achieve the stated government interest that must be "of the highest order," *Yoder*, 406 U.S. at 215; *see also, id.* at 221, but the government must use the least restrictive means available. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Thomas*, 450 U.S. at 718. Accordingly, the Mandate must be "drawn in narrow terms to accomplish" the government's stated interest. *Lukumi*, 508 U.S at 546.

In this context, the government must "identify an 'actual problem' in need of solving, and the curtailment of [the right] must be actually necessary to the solution." *Korte*, 735 F.3d at 685 (quoting *Brown v. Entm't Merchs. Ass'n*, ___ U.S. ___, 131 S.Ct. 2729, 2738, 180 L.Ed.2d 708 (2011) (citations omitted)). If "[t]he proffered objectives [of the Mandate] are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree," then the regulation will be invalid. *Lukumi*, 508 U.S. at 546. Regulations that exempt non-religious conduct that has the same effect as the requested religious exemption are not narrowly tailored and cannot pass constitutional muster. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (finding

that exception to the "no beard" rule for medical reasons made the failure to exempt individuals from the rule for religious reasons unconstitutional because it "devalued their religious reasons for wearing beards by judging them to be of lesser import than medical reasons"); *Stormans, Inc. v. Selecky*, 844 F.Supp.2d 1172, 1190 (W.D. Wash. 2012) (*Stormans I*) (finding that regulations that precluded an opting out of providing emergency contraception for religious reasons were not narrowly tailored and therefore invalid when regulations provided for a host of secular, non-religious reasons for a pharmacy to avoid stocking emergency contraception and other drugs and for individual pharmacists to decline to dispense the drug); *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542(BMC), 2013 WL 6579764 *18-19 (E.D.N.Y. Dec. 16, 2013) (invalidating the Mandate due, in part, to other less restrictive means available).

Here, the government has alleged that the Mandate is necessary to promote "[1] public health and [2] gender equality." *Hobby Lobby*, 723 F.3d at 1143. The government then "argues that the contraception mandate furthers these interests by reducing unintended pregnancies, achieving greater parity in health-care costs, and promoting the autonomy of women both economically and in their reproductive capacities." *Korte*, 735 F.3d at 686. Of course, such "broadly formulated interests justifying the general applicability of government mandates" is insufficient to state a compelling government interest. *Hobby*

Lobby, 723 F.3d at 1143 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)). Moreover, "[b]y stating the public interests so generally, the government guarantees that the mandate will flunk the [strict scrutiny] test." *Korte*, 735 F.3d at 686. This is so because "such a high level of generality makes it impossible to show that the mandate is the least restrictive means of furthering them. There are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty." *Id.*

2. The Court's more lenient test announced in *Smith* is not applicable because the Mandate is not a rule of neutral and general applicability.

In *Smith*, the Court abandoned the compelling interest test for laws that were "neutral" and of "general applicability" and did not seek to regulate "religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs." 494 U.S. at 1600-02. Here, as noted above, the government has not applied the Mandate in a neutral manner and the Mandate is anything but "generally applicable" given the wide ranging exemptions that already exist to the Mandate for secular and narrow religious reasons. Such wide ranging exemptions take the Mandate out of the category of a regulation that is "neutral" and of "general applicability" into one that is "religious gerrymandering." *Lukumi*, 508 U.S. at 537.

By granting secular exemptions for "grandfathered" plans and small employers in their entirety, the government removed the Mandate from any possible application of the *Smith* test and back into the traditional compelling interest test. *Fraternal Order of Police*, 170 F.3d at 364-65. Even the granting of an exemption for one kind of religious employer, houses of worship and their integrated auxiliaries, the government demonstrated that the Mandate was not neutral or of general applicability. *Gonzales v. O Centro Expirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (finding that granting an exception to the Controlled Substances Act for religious peyote use by Native Americans compelled the government to grant an exemption for the religious use of hoasca). Indeed, "[h]aving granted so many exemptions already, the Government cannot show a compelling interest in denying one to" valid religious objectors. *Roman Catholic Archdiocese of New York*, 2013 WL 6579764 at *17.

The Court's traditional Free Exercise jurisprudence favors the application of the compelling interest test with a least restrictive means requirement even when reviewing laws of general applicability. *Yoder*, 406 U.S. at 220 (rejecting that Wisconsin's compulsory school attendance law should be upheld just because it "applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns"). As this Court explained, "A regulation neutral on its face may, in its

application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Id.*

II. OTHER LESS RESTRICTIVE MEANS EXIST FOR THE GOVERNMENT TO MEET ITS ALLEGED COMPELLING GOVERNMENT INTEREST.

Even if the Court were to determine that the government's stated interests were compelling interests "of the highest order" and that the Mandate furthered those interests, the question becomes whether the Mandate is the less restrictive means available to further those interests. As shown below and as found by several lower courts, it is not.

A. The Government's Exemption of so Many Employers from the Mandate for a Variety of Reasons Establishes that the Regulation Is Not the Least Restrictive Means Available.

Under the ACA, numerous employers and plans are exempted from complying with the Mandate. First, certain narrowly defined religious employers are completely exempt from the Mandate, 45 C.F.R. § 147.130(a)(1)(iv)(A). Second, religious non-profits are afforded an "accommodation" to allow them to certify an objection to the Mandate and avoid the fines and penalties so long as they authorize their third party administrator to provide coverage in

accordance with the Mandate. 78 Fed.Reg. at 39,874, 79-80, 82.[3] Third, businesses that maintain "grandfathered" plans do not have to comply with the Mandate. 42 U.S.C. § 18011(a)(2). Fourth, businesses with fewer than 50 employees are exempt altogether from supplying insurance coverage to their employees and are thereby exempt from the Mandate. 26 U.S.C. § 4980H. Such exempt plans cover between 50 million and 100 million people in the United States. *Hobby Lobby*, 723 U.S. at 1124.

The Court has established in its strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. Here, the government has created exceptions to the Mandate for secular and religious reasons alike, only to exclude from any exemption individuals and businesses that operate on a for-profit basis.[4] Importantly, the government has not taken the first step to provide a means for the employees who work for excepted employers to obtain the mandated contraceptive, abortion-causing drugs and sterilization services

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[3] The constitutionality of this requirement is working its way through the lower courts. *See, e.g., Roman Catholic Archdiocese of New York*, 2013 WL 6579764 at **5 and 18.

[4] The constitutional infirmity of the "accommodation" for religious non-profits is not discussed here and, while not before the Court, is certainly implicated in a least restrictive means analysis as noted in Section II.C., *infra*.

required by the Mandate. In short, the government has declared that it is sufficient to leave those enrolled in exempt plans potentially without the benefits of the Mandate rather than create a means for those women of child bearing age in such plans to obtain these services at no cost. As such, there is no rational basis, let alone a narrowly tailored regulation designed to achieve a compelling government interest to require all religious objectors to comply with the Mandate. *O Centro*, 546 U.S. at 431-33; *Lukumi*, 508 U.S. at 546-47 (holding "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling").

B. Other Less Restrictive Means are Available.

There are a number of less restrictive means that would achieve the government's stated goals while not imposing on the religious liberties of those whose sincerely held religious beliefs preclude the providing or facilitating access to contraception, abortion-inducing drugs, or sterilization. For example, in *Korte*, the court noted:

> there are many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors. The plaintiffs have identified a few: The government can provide a "public

> option" for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and sterilization services. No doubt there are other options.

735 F.3d at 686. The *Korte* court further noted that the government did not make "*any* effort to explain how the contraception mandate is the least restrictive means of furthering its stated goals of promoting public health and gender equality." *Id.* at 687 (emphasis in original).

Likewise, in *Hobby Lobby*, the court found that the government failed to articulate any reason why granting the limited exception requested there would "fundamentally frustrate[ ] [the government's] goal." 723 F.3d at 1144. With so many exemptions already available there must be some rational basis for denying a religious exemption, yet the government fails to articulate any such reason. *See Fraternal Order of Police*, 170 F.3d at 365. It is clear that the Mandate is not narrowly tailored based on the statutory and regulatory exemptions identified above. *Stormans I*, 844 F.Supp.2d at 1199 (holding that the State's stocking and delivery rules "are not at all narrowly tailored; they are instead riddled with secular exemptions that undermine their stated goal of increasing patient access to all medications").

The District Court in *Roman Catholic Archdiocese of New York* also recently found that there are

"numerous less restrictive alternatives . . . readily apparent" to the Mandate. 2013 WL 6579764 at *18. In support, the court noted the following:

> The Government could provide the contraceptive services or insurance coverage directly to plaintiffs' employees, or work with third parties – be it insurers, health care providers, drug manufacturers, or non-profits – to do so without requiring plaintiffs' active participation. It could also provide tax incentives to consumers or producers of contraceptive products. Many of these options have been recognized as feasible alternatives by other courts. *See Korte*, 735 F.3d at 686.

Id.

The government's objections to these alternatives – administrative costs and an additional burden on those in exempt plans who want contraceptive coverage – have been rightly rejected. *See Korte*, 735 F.3d at 686-87; *Roman Catholic Archdiocese of New York*, 2013 WL 6579764 at **18-19. The government has ignored alternatives to its Mandate's substantial burden on religious objectors while intentionally leaving tens of millions of people outside of the Mandate's supposed benefits. As a result, the government fails the strict scrutiny analysis that governs the issue.

C. There Would Be Minimal Cost or Disruption From Granting an Exemption to Businesses that Object to the Mandate on Religious Grounds.

There is no evidence that granting a religious exemption would unduly limit or deny women access to low-cost or no-cost contraceptive services as required by the Mandate by using less restrictive means. For example, in *Stormans I*, the State of Washington desired to ensure that all women who wanted access to emergency contraception could obtain it in a timely manner, so the State prohibited pharmacies and individual pharmacists from refusing to stock or deliver the drugs due to religious objections. When scrutinized, the motivation of the State was to target religious activity. *Stormans I*, 844 F.Supp.2d at 1176-79. Additionally, the evidence established that the alleged "problem" was nonexistent as there was not an access problem in Washington State to emergency contraception and the number of pharmacies and pharmacists who objected to stocking or dispensing the drugs was minimal. *Stormans, Inc. v. Selecky*, 854 F.Supp.2d 925, 946-48 (W.D. Wash. 2012) ("*Stormans II*"). The same is true here.

1. Granting religious objectors an exemption to the Mandate would not frustrate or do harm to the government's stated goals.

Initially, the question the government must answer is the impact on its stated goals from granting an exemption to a particular business that objects to providing the required coverage on the basis of religious beliefs. *Hobby Lobby,* 723 F.3d at 1143 (quoting *O Centro*, 546 U.S. at 430). The question necessarily concerns the extent to which businesses would seek a religious exemption. As noted above, the government has already granted an exemption for secular ("grandfathered" plans and small businesses) and limited religious reasons (houses of worship and integrated auxiliaries) that amount to tens of millions of covered persons. The incremental step of granting exemptions to employers who object to some or all of the Mandate's requirements on the basis of religious objections is likely small. It is important to remember that the exemption would only be available based on religious beliefs, not personal philosophical preferences as the First Amendment only protects religious free exercise. *Yoder,* 406 U.S. at 215-16. The government fails to identify by any analysis the number of potential religious objectors, choosing instead to rely on a blanket statement that any further exemptions would frustrate the goals of the Mandate. Such an unsupported generalization fails to meet the government's burden. *Sherbert*, 376 U.S. at 407 (when faced with possibility that people would

fraudulently take advantage of a religious exemption, "it would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights"); *Korte*, 735 F.3d at 686-87; *Roman Catholic Archdiocese of New York*, 2013 WL 6579764 at **16-17.

In trying to estimate the number of women likely affected by religious objections to the Mandate, RRA reviewed 39 complaints from for-profit businesses seeking relief to determine the number of employees covered by insurance purchased by those employers. It determined that fewer than 20,000 employees are covered by the plans that are subject to current litigation.[5] The sum calculated from each complaint is 19,932. This figure is not merely women or insured employees with female dependents, but all employees insured by each organization as listed in each respective complaint, meaning it includes women past childbearing age as well as men.

There are many nuances to control for when estimating the number of people likely to be affected

[5] Of course, this estimation does not take into account those businesses that object to the Mandate on religious grounds but lacked the funds or other means to challenge the application of the Mandate to their business. The burden of showing that such numbers would make the government's system unworkable falls to the government and it makes no effort to show any adverse effect from granting the exemptions requested by the parties currently before the Court or who have filed lawsuits that remain pending in lower courts.

from an employer objection of contraception coverage that have been included in the methodology employed here to create a reasonable estimate of women who could be denied contraception by for-profit litigants. For example, because women are virtually the exclusive users of contraception and have use of it only during reproductive ages, it is important to both get an estimate of women who are insured, either as an employee or a dependent on someone else's insurance policy, and the number of women ages 15-44 who would potentially be consumers of contraception. All caution was taken to estimate figures precisely, but with data broad enough to represent both the for-profit litigants and others which may come forward at a later date. Furthermore, the margin of error has been shifted on the side of overestimation. This compensates for limitations in data and provides a reasonable, maximum figure while conceding that the true figure is likely less.

To estimate the number of persons who may be affected by an absence of contraception coverage, this analysis relied upon the most recent data from several sources, including The Bureau of Labor Statistics (BLS), the Census Bureau, and the Centers for Disease Control (CDC). According to the latest data from a 2013 report by the BLS, women represent 58.1 percent of the workforce.[6] One limitation of this data

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[6] *See* Bureau of Labor Statistics (2013) "Women in the Laborforce: A Databook" available at http://www.bls.gov/cps/wlf-databook-2012.pdf.

is that while women account for 58.1 percent of the workforce, women are more likely than men to work to part-time positions that would not be insurance-eligible (27 percent of employed women are part-time versus 11 percent of men).[7] This is the common explanation for why men are more likely to be offered employment-based insurance than women, yet there is also a difference in the number of women who accept insurance when offered. A Census Bureau report indicates that men accept employment-based insurance offers 73.9 percent to 65.3 percent of women.[8] Since industries may also vary on the prevalence of women, and employers may choose to extend insurance even to part-time workers, a figure was found that estimates the number of women who receive employment-based insurance across all industries. A 2013 report from the Kaiser Foundation states 58 percent of women have insurance coverage directly from their employer.[9] In the interest of erring on the side of overestimation, we have assumed that since 58.1 percent of the workforce are women (and 58 percent of women receive insurance through their employer) that 58.1 percent of those insured can be

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[7] *Ibid.*

[8] *See* Janiki, H. (2013) "Employment Based Health Insurance: 2010" available at http://www.census.gov/prod/2013pubs/p70-134.pdf.

[9] *See* The Henry J. Kaiser Foundation (2013) "Women's Health Insurance Coverage" available at http://kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage-fact-sheet/.

assumed female. By these calculations, 11,581 of the 19,932 employees insured are women.

Data from the 2013 BLS report was disaggregated and then summed to determine that 48 percent of women in the workforce are of childbearing age (16-44).[10] Therefore, of the 11,581 females, an estimated 5,559 are women ages 16-44 who could be consumers of contraception. For ease, this figure will be rounded to 5,600.

There is the additional issue of dependents, as female spouses of reproductive age and daughters need to be considered when forming our estimate. In 2010, 21.7 percent of all people age 15 and ov were dependents on employment-based health coverage.[11] However, 2010 was prior to the Affordable Care Act mandate that insurers include young adults on their parent's insurance plan through age 26.[12] Spousal coverage is not mandated, often penalized or discouraged by employers and recently, many employers have excluded spouses altogether.[13] Nonetheless, 23 percent of women are listed as dependents on

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[10] *See* Footnote 6, Table 1, pg. 8.

[11] *See* Footnote 8, Figure 1, pg. 3.

[12] *See* Footnote 9.

[13] *See* Wieczner, Jen (2013) "Why your boss is dumping your wife: UPS joins growing list of companies kicking spouses off health insurance" available at http://www.marketwatch.com/story/why-your-boss-is-dumping-your-wife-2013-02-22.

job-based health insurance.[14] The BLS reports 58.2 percent of men are married with a spouse present, which (age of spouse not considered) adds 4,861 potential females.

Since a majority of insured women obtain coverage directly through their employers, this figure is almost assuredly a high estimate. Yet with the addition of potential female dependents of childbearing age up until age 26, even females with insurance beyond childbearing age may have daughters covered under their plan. However, to account for this uncertainty, we can assume all 4,861 spouses are covered under insurance to compensate for other potential dependents of both men and women of all ages (rounded to 4,900 for ease). When summed with the 5,600 women ages 16 to 44 estimated to be directly insured, a broad, yet reasonable estimate of potential contraceptive users affected by the for-profit litigants is 10,500.

This figure of 10,500 is merely a broad estimate of potential contraceptive consumers, not actual consumers. To estimate actual consumers, this requires the percentage of women using contraception which requires medical consultation and would be covered by insurance. The most recent figures on contraceptive usage from the Centers for Disease Control (CDC) indicate that only 62.2 percent of women

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[14] *See* Footnote 9.

of childbearing age (15-44) use contraception.[15] Of those, 14 percent of all women choose condoms, fertility awareness, or other methods that do not require insurance coverage.[16] The remaining women, 37.8 percent, are either not sexually active, already pregnant, seeking pregnancy, surgically or non-surgically sterile or otherwise not interested in contraception.[17] Accordingly, over half (51.8 percent) of the potential consumers of contraception are not consumers of contraception provided through health care plans at all. This leaves 5,061 (48.2 percent of 10,500) likely consumers of contraception who would benefit from contraception coverage in a health care plan. In short, for 19,932 insured persons, the lack of contraception coverage only affects around 25 percent of those insured assuming all contraceptive methods are refused.

This number is even smaller when considering that the largest employers which have filed complaints are willing to supply most contraception and object to only some methods with abortion-causing potential. In particular, Hobby Lobby opposes the intra-uterine

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[15] *See* Jones, H., Mosher, W., Daniels, K. (2012) "Current Contraceptive Use in the United States, 2006-2012, and Changes in Patterns of Use Since 1995" available at http://www.cdc.gov/nchs/data/nhsr/nhsr060.pdf.

[16] *Ibid.*

[17] *Ibid.*

device (IUD) and emergency contraception (EC), and Conestoga's objection to the Mandate is similar.

Of the 19,932 insured persons listed on for-profit complaints, these two employers comprise 14,562 or 73 percent of this total. Using the above methodology, they represent an estimated 7,665 of the 10,500 women insured. They also provide the contraceptive of choice for 96.2 percent of their employees.[18] In fact, the most recent figures on contraceptive usage from the Centers for Disease Control (CDC) indicate that only 3.5 percent of contraception users choose the IUD and only 0.3 percent of women list usage of the morning after pill among many other methods.[19] This is consistent with a different report by the CDC that found that only one in nine women have ever used EC between 1995-2010, although this number continues to rise due to over-the-counter (OTC) access (not necessarily insurance coverage).[20] When available by prescription only, EC had been accessed by 4.2 percent of sexually active women of the population over the previous 7 years, or 0.6 percent per year.[21] While birth control failure can be perceived with some methods (like condoms) and lead to women seeking

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[18] *See* Footnote 15, Table 1.

[19] *Ibid.*

[20] *See* Daniels, K., Jones, J. & Abma, J. "Use of Emergency Contraception Among Women Aged 15-55: United States, 2006-2010" available at http://www.cdc.gov/nchs/data/databriefs/db112.pdf.

[21] *Ibid.*

EC, lifestyle choices such as unprotected sex and choosing not to use any of many other contraceptives covered by Hobby Lobby and Conestoga's insurance plans would be hard to confidently estimate. Because only 11 percent of the total population have ever used EC even once, and women can access some forms of EC immediately without an appointment or a prescription, the likelihood of insurance reimbursement for EC is minimal.[22]

TABLE 1: Persons affected by the Plaintiffs' opposition to the IUD and EC.

CONTRACEPTIVE STATUS AND METHOD	PERCENTAGE OF WOMEN BY CONTRACEPTIVE METHOD	ESTIMATED NUMBER OF CONSUMERS
Potential Consumers insured by the plaintiffs:	7665	
All Contraceptive Consumers:	62.2 percent	4768
Female Sterilization	16.5 percent	1265
Male Sterilization,	6.2 percent	378
Oral Contraception Pill	17.1 percent	1376
Implant, Lunelle, Patch	4.5 percent	362
Injection	2.3 percent	185
Contraceptive Ring	1.3 percent	105

[22] *Ibid.*

Intrauterine Device (IUD)	**3.5 percent**	**282**
Other Methods: *emergency contraception*[3]	**0.6 percent**	**48**
Non-Prescription Methods (condom, periodic abstinence, withdrawal)	14 percent	1073
Non-Contraceptive Users (not sexually active, pregnant or seeking pregnancy, post-partum, infertile)	37.8 percent	2897
TOTAL ESTIMATE OF PEOPLE AFFECTED BY THE PLAINTIFFS' OPPOSITION TO THE IUD AND EC: 330		

1 Figure includes additional 5 percent for prescription, non-surgical methods.

2 Male sterilization was calculated from the number of insured males of all ages from Hobby Lobby/ Conestoga (6101).

3 Figure doubled to 0.6 to account for potential but unexpected spikes in emergency contraception usage.

A very liberal estimate of the number of women who may be denied free coverage of those contraceptive methods opposed by the Plaintiffs on religious grounds is 330 women. This figure was purposely inflated by 5 percent to compensate for price elasticity, an estimated increase in the demand for these services if offered at a lower price due to insurance.

The CDC report does not list cost as a barrier to contraceptive use, nonetheless, IUD and EC usage was increased here by 5 percent and still results in only 330 women affected.

Extrapolating from here, Table 2 offers the number of women affected by the other litigants, assuming the other for-profit litigants oppose all contraception even though not all of the other for-profit litigants actually oppose all means of contraception.

TABLE 2: Estimated Women Insured by Other For-Profit Corporations By Contraceptive Usage Type.

CONTRACEPTIVE STATUS AND METHOD	PERCENT OF WOMEN BY METHOD	ESTIMATED NUMBER OF USERS
Potential Consumers (P) insured by for-profits with complaints on file:	2835	
All Contraceptive Users:	62.2 percent	1763
Female Sterilization	16.5 percent	468
Male Sterilization,	6.2 percent	137
Oral Contraception Pill	17.1 percent	509
Implant, Lunelle, Patch	4.5 percent	134
Injection	2.3 percent	68
Contraceptive Ring	1.3 percent	39
Intrauterine Device (IUD)	3.5 percent	104

Other Methods (diaphragm, emergency contraception, cervical cap, sponge)[1]	0.3 percent	9
Non-Prescription Methods (condom, periodic abstinence, withdrawal)	14 percent	397
Non-Contraceptive Users (not sexually active, pregnant or seeking pregnancy, post-partum, infertile)	37.8 percent	1072
Total Estimate of Actual Consumers Among For-Profit Litigants Assuming Opposition to All Contraception: 1366		

1 Figure includes additional 5 percent for prescription, non-surgical methods.

2 Male sterilization was calculated from the number of insured males of all ages employed by litigants other than Hobby Lobby/Conestoga (2212).

The sum of people affected by both the Plaintiffs and other for-profit corporations complaints is 1,696 people. This is already a liberal estimate, but can be rounded to 2,000. The Plaintiffs represent a special case in that they have more narrow religious objections, while many other litigants have a blanket opposition to contraception. Yet, with all objections considered, the 5,370 total persons insured by the other for-profit litigants (excluding Hobby Lobby/Conestoga)

amounted to only 1,366 persons likely to be affected by refusal to cover contraception and sterilization. This amounts to 25.4 percent of the insured who are actual consumers of insurance-covered contraception, if we include a potential 5 percent increase. It is therefore safe to estimate, that only 254 people per 1,000 persons insured would be affected by employer objections to cover contraception.

2. The government already has the means to provide the Mandated services without having to burden religious objectors' free exercise rights.

"A statute or regulation is the least restrictive means if 'no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights." *Roman Catholic Archdiocese of New York,* 2013 WL 6579764 at *18 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 684 (D.C. Cir. 2008) (quoting *Sherbert*, 374 U.S. at 407)). Thus far, the government implies that the only mechanism to provide contraception is to force employers, under threat of huge penalties, to purchase what they find objectionable. Yet, solutions exist that would achieve the government's desired outcome of widely available contraception while avoiding a free exercise burden to those employers who object to providing such coverage on religious grounds. The government need not mandate that employers include coverage for objectionable drugs and procedures in their health

care plans to achieve its ends. Rather, there are less restrictive, markedly inexpensive means at the government's disposal to provide contraception in accordance with its goals that do not infringe on employers' religious convictions. The government is able to accommodate all religious objectors' requests for an exemption with ease (and likely at considerably less expense than litigation).

The government already has a massive network at its disposal to dispense contraception, complete with programs and clinics which exist exclusively for that purpose. Government programs already provide contraception to 8.9 million women at 8,400 publicly-funded clinics nationwide (as of 2010).[23] Nearly half of these clinics (4,100) received Title X funding.[24] While Medicaid includes family planning among a host of other services, Title X exists exclusively for family planning and provides free or low-cost contraception to 4.7 million clients annually.[25] The average costs of contraceptive coverage are $239 per client, per year to the Title X program.[26] Since Title X clinics are not proprietary in nature (grants are reserved for

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[23] *See* Frost, J. (2013) "Contraceptive Needs and Services, 2010" available at http://www.guttmacher.org/pubs/win/contraceptive-needs-2010.pdf.

[24] *Ibid.*

[25] *See* Hasstedt, K. (2013) "Title X: An Essential Investment, Now More than Ever" available at http://www.guttmacher.org/pubs/gpr/16/3/gpr160314.html.

[26] *Ibid.*

non-profit and governmental organizations) and supplied with contraception at significantly reduced prices,[27] Title X provides completely free contraception to clients who meet federal poverty guidelines (around 15.4 percent of U.S. women).[28] By waiving the income requirement to obtain free contraception for the small population of women insured by employers who object to providing such coverage on religious grounds, the government could ensure these individuals have access to contraception while respecting religious freedom.

Another potential solution involves delivering contraception through Medicaid. The ACA already includes massive expansions to Medicaid that the Congressional Budget Office estimates will add 13 million enrollees[29] at an estimated $1.0 trillion added cost by 2022.[30] Medicaid has been expanded both

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[27] *See* Health Resources & Services Administration (2014) "Title X Family Planning Clinics" available at http://www.hrsa.gov/opa/eligibilityandregistration/specialtyclinics/familyplanning/index.html.

[28] DeNavas-Walt, C. Proctor, B. & Smith, J. (2013) "Income, Poverty and Health Insurance Coverage in the United States: 2012" available at http://www.census.gov/prod/2013pubs/p60-245.pdf.

[29] *See* Congressional Budget Office (2013) "CBO's May 2013 Estimate of the Effects of the Affordable Care Act on Health Insurance Coverage" available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/44190_EffectsAffordableCareActHealthInsuranceCoverage_2.pdf.

[30] *See* Holahan, J., Buettgens, M., Carroll, C. & Dorn, S. (2013) "The Cost and Coverage Implications of the ACA Medicaid

(Continued on following page)

broadly through the ACA and in other circumstances, particularly in providing family planning.

In recent years the Centers for Medicaid & Medicare Services (CMS) has offered states the option of obtaining a waiver that provides exceptions for family planning coverage to individuals who would not qualify for Medicaid; populations that did not meet income restrictions or somehow lost Medicaid coverage (i.e., those who lost coverage post-partum).[31] Although many states have challenged the broad expansion of Medicaid as part of the ACA, 30 states have employed waivers that offer 90 percent reimbursement for family planning services, and 11 have accepted a provision in the ACA that allowed amendments to the state Medicaid plan regarding family planning services.[32] Waiving income requirements for the small number of women who would seek family planning from Medicaid due to denial by their employers based on religious objections would avoid a burden on employers' free exercise rights while still allowing women insured through these employers to have the level of access to contraception the government desires.

Expansion: National and State-by-State Analysis" available at http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8384.pdf.

[31] *See* Guttmacher Institute (2014) "Medicaid Family Planning Eligibility Expansions" available at http://www.guttmacher.org/statecenter/spibs/spib_SMFPE.pdf.

[32] *Ibid.*

The solutions offered here suggest that any burden on the free exercise of religion is unnecessary to achieve the government's desired outcome. As noted above, the number of persons who are likely to be affected by an employer's religious objections is nominal (particularly when compared to the number covered by plans exempted under the government's current exemptions). Further, the per capita and aggregate cost of contraception is negligible, and providing contraception directly is a concession the government could make with procedural ease at minimal incremental cost if the government chose to provide the mandated coverage directly.

The latest figures for Title X is $239 per client, per year of public costs.[33] The costs to Medicaid are not much higher. In 2012, Oregon spent $270 per client, per year on contraception[34] and Washington spent $400 per client, per year on contraception.[35]

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[33] *See* Atkins, D. & Bradford, W. D. (2014) "Changes in State Prescription Coverage Mandates for Insurers: The Effect of Women's Contraceptive Use" p. 20. available at http://onlinelibrary.wiley.com/doi/10.1363/46e0314/abstract.

[34] *See* Association of State and Territorial Health Officials (2012) "Improving Outcomes and Reducing Costs: Oregon's Initiatives to Improve Birth Outcomes" available at http://www.astho.org/Programs/Access/Maternal-and-Child-Health/_Materials/Improving-Outcomes-and-Reducing-Costs – Oregon%E2%80%99s-Innovative-Reproductive-Health-Program/.

[35] *See* Washington State Department of Health (2013) "Washington State Family Planning Client Data Sheet 2012" available at http://www.doh.wa.gov/Portals/1/Documents/Pubs/930-119-ClientDataSheet.pdf.

In 2008, Iowa spent $364.40 per client, per year on contraception.[36] Therefore, to provide contraceptive services directly to the liberally estimated 254 actual consumers per 1000 insured by employers of conscience could cost as little as $60,706 to $101,600 per year. This is especially minimal understanding that these costs would only apply to direct government provision of contraceptive coverage for employees of employers who object to providing all such coverage on religious grounds, a number representing a very small percentage of businesses and certainly smaller than those employees working for employers with plans the government has already exempted from the Mandate for secular reasons.

There is no economic incentive to employers to seek an exemption as the cost to employers of insurance coverage that includes contraceptives is no higher than coverage which does not.[37] Accordingly, there is no basis and the government has not even suggested such a reason for employers to seek an exemption from the Mandate except for sincerely

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[36] *See* Udeh, B. (2009) "The Cost of Unintended Pregnancy in Iowa: A Benefit-Cost Analysis of Public Family Planning Services" available at http://ir.uiowa.edu/cgi/viewcontent.cgi?article=1047&context=ppc_health.

[37] U.S. Department of Health and Human Services, ASPE Issue Brief (February 2012), "The Cost of Covering Contraceptives Through Health Insurance" available at http://aspe.hhs.gov/health/reports/2012/contraceptives/ib.shtml.

held religious reasons.[38] There is also no evidence to suggest that with a constitutionally required exemption to the Mandate for religious objectors an exceedingly large number of people who want contraceptive coverage would be without it due to their employers' objections to providing it. The government faces minimal financial risk (or no risk under its current system because it does not provide such coverage to those covered under exempt plans at all) by merely providing the constitutionally required religious exemption from compliance with the Mandate.

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[38] In fact, it is just as likely if not more likely that smaller employers with religious objections to the Mandate would actually continue or provide health insurance coverage to their employees if an exemption were granted, thus saving the government from having to provide the entire health insurance coverage for this population.

CONCLUSION

For the foregoing reasons, this Court should permanently enjoin the enforcement of the Mandate against those employers who, based on sincerely held religious beliefs, object to providing contraception, abortion-causing drugs, and/or sterilization procedures along with related counseling as part of their health care plans.

Respectfully submitted,

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